IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

T. W. JENKINS & COMPANY, a Corporation,
Appellant,

vs.

ANAHEIM SUGAR COMPANY, a Corporation,
Appellee.

APPELLANT'S BRIEF.

Upon Writ of Error to the United States District Court, for the Southern District of California, Southern Division.

BEACH, SIMON & NELSON,
710 Board of Trade Bldg., Portland, Ore.
ALLEN & WEYL,
219 H. W. Hellman Bldg., Los Angeles, Cal.,
Attorneys for Plaintiff and Appellant.
GRAY, BARKER & BOWEN,
Suite 1029, Title Insurance Bldg., Los Angeles, Cal.
Attorneys for Defendant and Appellee.

BOYER PRINTING CO. PORTLAND

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STATEMENT OF THE CASE.

The writ of error in this case brings before the Appellate Court the judgment of the District Court for the Southern District of California, Southern Division, dismissing the Plaintiff's (Appellant's) Complaint to which a Demurrer had theretofore been sustained. The record is therefore brief and the question sharp and distinct.

The facts disclosed by the Complaint which were

held insufficient to state a cause of action may be epitomized as follows:

That the plaintiff had for many years been engaged in the wholesale grocery business and had an established business in buying, selling and dealing in sugar and kindred articles.

That in the ordinary course of plaintiff's business for many years its "requirements" of sugar during the month of August was in excess of 4800 bags and that this fact was known to the defendant, and that the defendant at the date of the hereinafter mentioned contract knew what amount plaintiff would require for its business in the month of August, 1914.

That in June, 1914, plaintiff and defendant entered into the following contract:

(Contracts subject to unforeseen acts of Providence, such as fire, earthquake, flood.)

San Francisco, Calif., June 13, 1914.

A contract is hereby entered into between Anaheim Sugar Company, party of the first part, and T. W. Jenkins & Company, party of the second part.

To-wit:

Party of the first part part sells and party of the second part buys August requirements bags fine granulated beet sugar at $4.20 per bag less 2% cash 8 days, f. o. b. San Francisco, August shipment.

It being understood and agreed that party of the first part guarantees the price up to time of arrival against decline only to the basis of the C. & H. and Western Sugar Refining Co.

ANAHEIM SUGAR COMPANY.
Per Ariss, Campbell & Gault, Agts.,
Party of the 1st Part.

T. W. JENKINS & COMPANY,
Party of the 2nd Part.

That it eventuated that plaintiff's "requirements" of sugar for August, 1914, amounted to 4800 bags, but that notwithstanding demand for delivery thereof, the defendant refused to deliver in excess of 600 bags, thus compelling plaintiff, in order to procure its "requirements" for that month to purchase same in the open market at an advance of $3.10 per bag.

A Demurrer (Transcript, pp. 13-16) was filed to this Complaint, subdivided with ingenious prolixity, into twelve or fifteen items, the burden of all of which, however, may be expressed as a contention that the contract is unenforceable because of uncertainty and ambiguity and the District Court sustained the Demurrer on the ground that the contract was void because of uncertainty and lack of mutuality.

The affirmative of the question, the resolution of which will, we believe, begin and end the Court's labors, we express as follows:

LEGAL POINT FOR DECISION.

A CONTRACT BETWEEN A AND B WHEREBY A AGREES TO SELL AND B TO BUY B'S "REQUIREMENTS" OF DESCRIBED ARTICLES AT A FIXED PRICE DURING A FIXED TERM IS MUTUAL AND BINDING IF B'S BUSINESS IS AN ESTABLISHED ONE AND HIS "REQUIREMENTS" REASONABLY DEFINITE AND ASCERTAINABLE OR KNOWN TO THE CONTRACTING PARTIES.

Lima Locomotive Co. v. Nat. Steel Castings Co., 155 Fed. 77.

Marx v. Amer. Malting Co., 169 Fed. 582.

Manhattan Oil Co. v. Richardson, 113 Fed. 923.

Ramey Lumber Co. v. Schroeder Lumber Co., 237 Fed. 39.

Golden Cycle Mfg. Co. v. Rapson, etc., Co., 188 Fed. 179.

Walker Mfg. Co. v. Swift, 200 Fed. 529.

Sterling Coal Co. v. Silver Springs, 162 Fed. 848.

Klipstein v. Allen, 123 Fed. 992.

Cold Blast Trans. Co. v. Kansas City, etc., Co., 114 Fed. 77.

Crane v. Crane, 105 Fed. 869.

Meier Dental Mfg. Co. v. Smith, 237 Fed. 563.

Conley Camera Co. v. Multiscope Film Co., 216 Fed. 892.

Loudenback Fertilizer Co. v. Tenn. Phosphate Co., 121 Fed. 298.

Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85.

Fuller v. Schrenk, 58 App. Div. 222.

Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671.

Wells v. Alexandre, 130 N. Y. 642.

Hickey v. O'Brien, 123 Mich. 611.

Dailey Co. v. Clark Can Co., 128 Mich. 591.

Grand Prairie Gravel Co. v. Wills Co. (Tex.), 188 S. W. 680.

Western Macaroni Co. v. Fiore (Utah), 151 Pac. 984.

Great Northern Ry. Co. v. Witham L. R. (C. P.), IX, p. 16.

R. C. L., Vol. VI, p. 62.

Cyc., Vol. IX, p. 329.

11 L. R. A. N. S., note p. 713.

ARGUMENT.

We are compelled to approach the discussion of this question without the aid of guiding precedents in the old books. Contracts of the character under examination are the outgrowth of the exigencies of modern business. Being thus more or less novel it is not surprising that early consideration of its prototypes did not result in uniform conclusions. The law of the subject is, however, gradually crystallizing and we believe the weight of authority, both as to number and power of reasoning, is indubitably in favor of sustaining the validity of the contract.

There are, however, certain important rules of construction, not of modern origin, which may be stated without the support of citations, as follows:

Contracts are to be given a reasonable construction.

Contracts are to be construed so as to support rather than nullify their provisions.

Our introductory statement may be taken as a concession that the law here involved is not so clearly and precisely defined as to justify a dogmatic statement.

This being true and the boast of the common law being its ability to grow, to fit, and to adjust itself to meet new conditions, it is of interest and importance to discern the *tendency* of the courts in the more recent decisions.

We earnestly believe that that tendency is toward the recognition of the sanctity of such contracts and toward the discouragement of quibbling and evasion.

We do not base our right to a recovery on the opinion or the authority (often anonymous) of articles in Digests or Encyclopaedias, because we realize that the weight of the views these express is derived solely from and is limited to the cases cited.

Their statements, however, as to *weight of authority*, etc., are not negligible in considering the *tendency* of the cases, and we therefore refer the Court to the expressions of two of the most reputable and reliable of these compilers.

Thus, one of the most recent works of the character mentioned, **Ruling Case Law**, discussing contracts of this character, points out, Vol. VI, page 62:

> "The effect of indefiniteness as to quantity has often arisen in the law of sales, usually in connection with contracts to furnish the buyer all of a certain kind of goods which he may need in his business during a certain time, or in connection with contracts to purchase all the output of a certain factory during a certain time, the amount of the output being indefinite. While the courts are not entirely in accord

> in reference to this question, such contracts are *not,* according to what seems to be the *weight of authority,* invalid for uncertainty. The quantity which is to be bought is made as definite as is possible under the circumstances." (Italics ours.)

And we have not found anywhere a clearer or more convincing statement of the law than that of the writer of the exhaustive editorial note on the subject in Volume 11, L. R. A. (N. S.) page 713, in the course of which he presents the following as his conclusion from a thorough examination of all the cases:

> "The question of the validity of an accepted offer to furnish such material as one may need in his business, as affected by the objection of a want of mutuality, is one as to which much conflict exists among the courts. As a rule, however, the *later decisions* are inclined to obviate this objection by construing such contracts in the light of the surrounding circumstances and the situation of the parties at the time of the contracts; and if, by the aid of such surroundings, the quantity purchased can be made reasonably to appear, or is capable of an *approximately accurate estimate;* and the further fact also appears that the vendee is in a position where, in all probability, he will require in his business the commodities which are the subject of the contract, the courts are inclined to imply an agreement upon his part that he will purchase all of that commodity covered by the contract which he may need in his business; and further to *imply* an *agreement* upon his part that he will *continue* in the business in which he is then engaged, and continue to use and need the com-

> modity mentioned in the contract during the period covered, thereby making the obligation mutual." (Italics ours.)

See also IX Cyc., page 329.

* * * * * *

In view of the fact that the transaction involved is a commercial one, and is accordingly, as pointed out in Marx v. American Malting Company, 169 Fed. 582, governed by Federal rather than State authority, we proceed at once to a discussion of the

DECISIONS IN THE SEVERAL FEDERAL CIRCUITS.

One of the leading cases on the subject and the one of the two in fact principally relied upon by the defendant (and the Court below) is

> **Cold Blast Trans. Co. v. Kansas City Bolt & Nut Co.**, 114 Fed. 77 (C. C. A. 6th Circuit).

While Judge Sanborn, in that case, denied the right of recovery, a reference to subsequent cases will disclose the interesting fact that the decision of Judge Sanborn in the Cold Blast case has been most frequently referred to, strangely enough (upon first consideration) as authority for decisions *upholding* contracts of the character of the one now under examination. A study of the language of the opinion, however, renders clear the reason for the apparent paradox.

In the Cold Blast case there was a **mere offer** to deliver an **unascertained** quantity of goods at a stated price and an acceptance thereof without, however, any agreement to purchase either the "requirements" or any

portion thereof. The Court held the particular contract void and unenforceable because of indefiniteness and lack of mutuality of obligation, but took occasion to delineate with precision and force the limitations of the doctrine.

Judge Sanborn pointed out that a mere general promise to deliver specified articles at certain prices without any agreement to order or accept is without binding force or effect, because such promise lacks one of the essential elements of an agreement—certainty in the thing to be done. The upholding, however, of a contract such as the one in suit, is an application rather than a contradication of this attribute of the necessity for certainty, and Judge Sanborn so points out in his opinion:

> "Contracts for the future supply, during a limited time, of articles which shall be required or needed or consumed by an established business, or used in the operation of certain steamships or other machinery, are no exceptions to this principle, because they fall under the rule, *Id certum est quod certum reddi potest.* * * * *An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the accepter during a limited time is binding and may be enforced, because it contains the implied agreement of the accepter to purchase all the articles that shall be required in conducting his business during this time, from the party who makes the offer.*" (Italics ours.)
>
> * * * * * *

(The other case relied upon by Judge Bledsoe,

Crane v. Crane (C. C. A. 7th Circuit), 105 Fed. 869, will be more particularly referred to hereinafter.)

A similar question, but one more closely analogous to that here presented arose later in the same court (6th Circuit), and it had occasion to give careful consideration in passing thereon, to the prior decision in the Cold Blast case. We refer to the leading case of

Lima Locomotive Co. v. National Steel Castings Company, 155 Fed. 77, 11 L. R. A. N. S. 713.

in which the opinion was rendered by Mr. Justice Lurton, then a Circuit Judge.

The contract in the Lima case, as in the instant case, was one to furnish the "requirements," and the decision of a Circuit Judge grounded on a **mistaken application** of the Cold Blast case, was overruled in the following language:

> "We find ourselves unable to agree with the learned circuit judge in respect to the non-mutuality of the contract by which the plaintiff agreed to supply all of the 'requirements' of the defendant's business for the remainder of the year 1902. The defendant was engaged in an established manufacturing business which required a large amount of steel castings. This was well known to the plaintiff, and the proposition made and accepted was made with reference to the 'requirements' of that well-established business. The plaintiffs were not proposing to make castings beyond the current requirements of that business, and would not have been obligated to supply castings not required in the usual course of that business. By the acceptance of the plaintiff's proposal, the defendant was obligated to take from

> the plaintiff all castings which their business should require. *The contract, if capable of two equally reasonable interpretations should be given that interpretation which will tend to support it and thus carry out the presumed intent of both parties.*" (Italics ours.)

And in the more recent case of

Marx v. American Malting Company, 169 Fed. 582, the Circuit Court of Appeals for the same Circuit, construing a contract to supply the Malting Company with its "requirements" of certain raw material for a definite period at a definite price, said:

> "Contracts for the supply of material to be used in a certain business for a certain time limited, or for the purchase of the entire output of a certain plant or manufactury, for a certain time or season, are valid; this specification of the quantity contemplated by the parties is held to be sufficiently certain; that the certainty can be ascertained from the means to be supplied by the future exercise of the business in good faith and in the normal manner of such business."
>
> **Manhattan Oil Co. v. Richardson,** (C. C. A. 2nd Circuit) 113 Fed. 923.

Here the contract was one whereby the defendant agreed to sell and the plaintiff to purchase all the oil it might require for its own use for a period of 12 months from the date of the contract. This contract the Court sustained, the pertinent language of the opinion being as follows:

"It is insisted for the Manhattan Oil Company that the contract was invalid for want of mutuality, and consequently that the trial judge should have directed a verdict for the defendant. If the contract did not obligate the plaintiff to take any specified quantity of oil, manifestly there was no consideration for the promise of the defendant. But in consideration of the defendant's promise to sell, the plaintiff promised to buy all the oil it should require for its own use for a specified period of time. Read in the light of the previous business relations of the parties, it is plain that by this was meant that it should buy what oil it should require for its use in its manufacturing business. *This is a very different promise from one to buy what it might desire, or from a mere option to buy. If it had bought oil from any other dealer for use in its business during the 12 months, its promise would have been broken, and the defendant could have recovered damages for any loss accruing.* The mutual obligation of the parties to perform the contract constituted a consideration for the promise of each. It is quite immaterial that the quantity of oil to be sold and bought was not definitely determined at the date of the contract, but was to be ascertained by extrinsic evidence." (Italics ours.)

Ramey Lumber Co. v. Schroeder Lumber Co., (C. C. A. 7th Circuit) 237 Fed. 39.

The defense interposed in this case was with regard to indefiniteness of quantity and lack of mutuality. The Court disposing of the contention said:

"As to the defenses of uncertainty and want of mutuality, we are unable to concur in the decision of the trial court. The contract did not lack mutuality of obligation. While defendant promised to buy of plaintiff all the lumber of a certain quality that plaintiff might own during the season, plaintiff bound itself, if it did manufacture or acquire any such lumber, to sell all of it to defendant and to no one else. Thus plaintiff deprived itself of the right to sell lumber to whom it pleased. The promise to restrict its freedom by giving up its right to sell to others was real and definite. It was the substantial and contemplated consideration for defendant's promise to buy all that plaintiff might own during the season. There was the mutuality of obligation essential to a bilateral contract; there was the consideration essential to the validity of any contract. That the plaintiff did not bind itself to acquire or manufacture any such lumber is immaterial. Its promise to deal with defendant was the valid consideration for the obligation by defendant—a consideration that made the undertaking of the other party binding and enforceable.

With regard to the question of uncertainty, a contract is void (save for the possibility of reformation in equity) because of uncertainty, only when it is so worded that the intention of the parties cannot be deduced therefrom. *If the intention be clear, the mere uncertainty of the amount involved does not invalidate the obligation, however it may affect the possibility of proving damages for a breach.*" (Italics ours.)

Golden Cycle Mfg. Co. v. Rapson, etc., Co., 188 Fed. 179 (C. C. A. 8th Circuit).

The Court (Justices Vandeventer, Hook and Carland sitting) quoted the following excerpt from the Cold Blast case (*supra*):

> "An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the accepter during a limited time is binding and may be enforced, because it contains the implied agreement of the accepter to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer."

And declaring its approval of the doctrine there announced, applied it to the contract in the case before it, which was one for the purchase of the coal the mine would use during a certain period, the word "use" being construed by the Court in the sense of "need," "require," or "consume."

* * * * * *

See also

Walker Mfg. Co. v. Swift, (C. C. A. 5th Circuit) 200 Fed. 529.

Sterling Coal Co. v. Silver Springs, (C. C. A. 1st Circuit) 162 Fed. 848 (to which case further reference will hereafter be made).

Klipstein v. Allen, (Circuit Court Northern District, Georgia,) 123 Fed. 992.

A WELL-REASONED ILLINOIS CASE.

For reasons previously stated we have omitted any reference to the many apposite decisions in the State Courts, but we invite the Court's attention to the very excellent and instructive discussion by Mr. Justice Magruder in the case of

Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85.

Because of the clarity of that opinion it has become a respected precedent and we accordingly quote from it somewhat at length (the facts sufficiently appearing in the quoted portion):

> "It is said by counsel for appellant that the amount of quantity of appellant's 'requirements' of anthracite coal for the season of 1886-1887 is not fixed by the contract, and that, for this reason, it is wanting in certainty; and that the contract does not bind appellant to 'require' any coal, and for this reason is wanting in mutuality.
>
> Contracts should be construed in the light of the circumstances surrounding the parties, and of the objects which they evidently had in view. The circumstances which both parties had in view at the time of making the contract may be referred to for the purpose of determining the meaning of doubtful expressions. Courts will seek to discover and give effect to the intention of the parties, so that performance of the contract may be enforced according to the sense in which they mutually understood it at the time it was made; and greater regard is to be had to their clear intent than to any particular words

which they may have used to express it. The parties representing the companies who entered into the contract of August 4, 1886, were practical business men. The word 'requirements' as used by them, evidently meant the amount or quantity of coal which appellant would need in its business for the specified season. Appellant agreed to buy such anthracite coal as it should need in its business for the season of 1886-1887, of appellee at a certain price per ton, and appellee agreed to furnish said amount of coal, free on board the cars at Chicago or Milwaukee, at said price per ton, as it should be ordered by appellant during said season.

The plea avers that defendant was engaged in the purchase, use and sale of coal in its business, and that its requirements therein for that season were very large, and that such fact was well known to the plaintiff. The parties will be presumed to have contracted with reference to the knowledge which they then had upon that subject, and upon the supposition that appellant would need the same quantity of coal which it had theretofore been in the habit of using. The word 'requirements' evidently had the same meaning as the word 'needs.' The amount of coal which was 'required' for the business of that season was the amount of coal which was 'needed' in the business of that season.

If the word 'requirements' as here used, is so interpreted as to mean that appellee was only to furnish such coal as appellant should require it to furnish, then it might be said that appellant was not bound to require any coal unless it chose, and that therefore there was a want of mutuality in the contract. But the rule

> is that where the terms of a contract are susceptible of two significations, that will be adopted which gives some operation to the contract, rather than that which renders it inoperative.
>
> A contract should be construed in such a way as to make the obligations imposed by its terms mutually binding upon the parties, unless such construction is wholly negatived by the language used. It cannot be said that appellant was not bound by the contract. It had no right to purchase coal elsewhere for use in its business, unless, in case of a decline in the price, appellee should conclude to release it from further liability."

(It is worthy of note that Judge Sanborn in the Cold Blast case (*supra*) cites the Whitebreast case with apparent approval.)

See also:

Fuller v. Schrenk, 58 App. Div. 222, 64 N. E. 1126.

Bartlett Springs Co. v. Standard Box Co., 16 Cal. App. 671.

PSEUDO-DISTINCTION UNDER WHICH RECOVERY WAS DENIED.

These authorities—and they fairly represent the current of opinion—seem amply to establish the validity of the contract. But the District Court permitted the defendant to evade the obligation thereof on the theory that a distinction subsists between a contract for the "requirements" of some species of raw material entering into a manufactured product and a contract for the

"requirements" of the same raw material by a wholesale grocery firm. In fact we understand from the Brief of Counsel for defendant in the lower court that they concede that if the plaintiff were a candy manufacturing concern, the contract in the instant case would have been enforceable!

The distinction is ingenious but will, we believe, upon examination be found to be sophistical. It is based primarily on **presumptive dishonesty of contracting parties** and on **pusillanimity of courts.** That this observation is not overdrawn will be manifest upon consideration of the bifurcated argument for the distinction:

> (a) A manufacturing concern will continue to use its "requirements" of raw material entering into its finished product independently of market fluctuations—it will not go out of business in order to procure the purchases stipulated for in the contract.
>
> (b) The "requirements" of raw material by a manufacturing plant are regular in amount and easily ascertainable while the same requirements of a wholesale concern are conjectural and can be made heavy on an advancing market, or light on a declining one.

* * * * * *

The first proposition, i. e., that a manufacturing concern will not go out of business in order to eliminate or cut down its requirements, stated as a distinction, involves the supposition that a wholesale concern can or will go out of business in certain lines, e. g., the staple and fundamental one of sugar! Does such an argument appeal to this Court as a basis for nullifying a contract

entered into in good faith between a reputable established wholesale house and the manufacturer from whom and it anticipates its requirements in a most staple branch of its business?

Mr. Justice Holmes, sitting in Circuit, manifested little patience with a similar argument, although in the case referred to—that of Sterling Coal Co. v. Silver Springs, 162 Fed. 848—it was advanced as to a manufacturing concern, Mr. Justice Holmes' animadversion is no less applicable here.

The "right" to go out of some particular branch of business was referred to by that incisive Jurist as a "purely theoretical freedom."

The contention so made admits the validity of such contractual provisions if made on behalf of *factories* but denies their validity to *wholesalers*. In other words by this process of reasoning the word *"factory"* is to become a new shibboleth in the law of contracts. If Jenkins & Company operated a candy factory the defendant admits that it (defendant) would have to live up to its agreement, notwithstanding the rise in the market price of sugar, but Jenkins & Co. being only a wholesale concern the contract is not to be binding on the defendant if it eventuates that it will lose money thereunder. We invite the Court's analysis of the situation thus presented.

Taking the illustration suggested by the defendant's argument: About ninety-five per cent of the material used in making candy is sugar. In the cheaper grades the price of sugar represents about eighty per cent of the manufacturing cost of the finished article. Take the case of a manufacturer specializing in so called "French" candy at ten cents per pound, based on a cost of sugar to him of seven cents per pound

secured under a contract for "requirements." Sugar then drops to four cents per pound, enabling his competitors purchasing at that figure to sell the finished product at seven cents per pound. If the possibility of the intervention of sordid motives is to be the determining factor in the law of contracts, how absurd to say that the candy manufacturer would not have the same inducement to eliminate or cut down its business as would the wholesale house! Verily "spurious" and "theoretical" are apt terms to apply to such distinctions. We venture to say that in either case the purchaser would and should be held bound to take what a properly instructed jury would find to be its "requirements" based on its past history in the light of present market conditions of supply and demand, and this is precisely what the Courts have done, as we shall hereafter point out.

* * * * * *

The second phase of the "distinction," i. e., that the requirements of raw materials by a manufacturing plant are regular, while those of a wholesale plant are conjectural and can be made to change with market conditions as to price, is illogical in no less degree than the first. The illustration already cited—the candy factory —makes this clear without comment.

As a matter of fact the two contentions are in reality one and amount to a statement of the converse of the Legal Point in which we summarize our case, as expressed under the heading "Legal Point for Decision," at the outset of this brief. This negative or converse statement is equivalent to saying that a contract for requirements of some particular merchandise if made on behalf of a business **not** established and in which the amount to be used is purely **speculative** and

without guiding precedent, and where no obligation rests upon the purchaser to take any amount whatsoever, is uncertain, unilateral and void. This, we concede, but it is utterly inapplicable to the case at bar.

The test of the validity of such contracts is furnished by the answer to the question:

Are the requirements reasonably certain of ascertainment within fair limits of fluctuation, and is there an obligation to purchase?

It is quite possible that under ordinary circumstances a factory may have less inducement for minimizing its "requirements" of some one particular variety of raw material than a wholesale concern with regard to one branch of merchandise, but if this be conceded, it does not involve or justify a conclusion that the *rights* of parties are to be absolutely determined by the answer to the question of whether the purchaser is a manufacturer or a dealer.

The error of the lower Court inhered in its assumption that the test lies in the applicability of the terms "manufacturer" or "dealer," whereas the real logical distinction lies deeper. The lower Court simply confused an *illustration* of a theorem with the theorem itself.

The lower Court was probably misled by the fact that in one or two cases it is intimated that the contract there passed on being one of a "factory" for a portion of its material would be upheld and then by way of comparison adding *dicta* to the effect that the case would have been different if it had been a contract by some dealer for part of his merchandise. We assume that the distinction thus suggested did not arise from any predilection for factories, but because of a belief

on the part of the Judge employing the comparison that the elements of uncertainty and mutuality were present to a greater extent in the naked instances suggested than in the case of a factory. If, however, the word "factory" is not a shibboleth, it follows that if the "requirements" of a *dealer* are as nearly capable of approximate estimation as those of a *manufacturer,* and if the contract is such that the temptation to eliminate any "requirements" is removed, the reason for the distinction, and necessary the distinction itself, falls. *That is precisely the case here made.*

In the first place it is admitted on Demurrer that defendant *knew* the approximate "requirements" of the plaintiff. So much for the quantity ordinarily taken and which might within reasonable limits ordinarily be expected to be taken.

Again, the temptation to cut down "requirements" because of a falling market, deemed by the lower Court fatal, was *expressly eliminated* by the contractual provision (overlooked or disregarded by the lower Court):

> **"It being understood and agreed that party of the first part guarantees the price up to time of refusal against decline, etc."** (Transcript of Record, p. 7), to the basis of the price charged by the Anaheim Company's principal competitors.

Under such circumstances the decision of the lower Court amounts to a judicial declaration that in no conceivable situation may a wholesale concern contract in advance for its requirements unless it can fix precisely the number of packages and pounds it will need. Surely such contracts are not against public policy. Why, then, are they void?

If a manufacturer like the Anaheim Sugar Company in order to get the exclusive business of a concern like Jenkins & Company, is willing to pledge itself to furnish Jenkins & Company's requirements at a fixed price and guarantee to lower it if the market falls, in consideration of Jenkins & Company's agreement to purchase its requirements exclusively from the Anaheim Company, what principle of law or morals is so violated as to nullify the contract?

The mere absence of a specification of exact quantity is not a controlling consideration. This characteristic inheres in many species of contracts, the validity of which has never been doubted. Thus a contract to take the output of a sawmill or other plant, is binding notwithstanding the impossibility of gauging in advance the precise measurements of the product; similarly as to contracts to supply certain articles to one who agrees to handle and push them, the agreement for services (like the agreement for exclusive purchase here), furnishing the consideration, and the contract being valid, notwithstanding the absence of limitation on quantity.

> **Meier Dental Mfg. Co. v. Smith,** (C. C. A. 8th Circuit) 237 Fed. 563.

While the facts in the case at bar are not the same, the principle involved is in no essential element different from such instances, or from cases like

> **Conley Camera Co. v. Multiscope Film Co.,** (C. C. A. 8th Circuit) 216 Fed. 892.

in which a contract by a camera manufacturer to sell cameras at a fixed price to a dealer having an established trade was held to be valid notwithstanding the absence of a specification as to particular quantities, the

agreement to handle (like our agreement of exclusive purchase), furnishing the consideration.

Under the contract in the instant case, Jenkins & Company bound itself to purchase exclusively from the Anaheim Company. This furnished a valid consideration for the promise of Anaheim Company to furnish Jenkins' requisites at a stated price. Not only was Jenkins inhibited from purchasing elsewhere, but the Anaheim Company could *compel* the purchase of the ordinary and reasonable requirements of Jenkins, or procure damages for the failure to make such purchase.

The obligation is thus not unilateral, but reciprocal. Jenkins & Company was just as much bound to buy its requirements from the Anaheim Company and to make its normal purchases, as the Anaheim Company was bound to supply its requisites.

> **Loudenback Fertilizer Co. v. Tenn. Phosphate Co.,** (C. C. A. 6th Circuit) 121 Fed. 298.

Indeed so firmly is this obligation fixed that the purchaser cannot evade his agreement to buy his requirements by transferring his business. The contract cannot be avoided by retirement:

> **Wells v. Alexandre,** 130 N. Y. 642, 29 N. E. 142.
>
> **Hickey v. O'Brien,** 123 Mich. 611, 82 N. W. 241.

This principle is clearly expressed in the excellent editorial note hereinbefore referred to, 11 L. R. A. (N. S.) 717:

> "Acceptance of the offer binds the acceptor to need substantially the same amount of commodities in the future as in the past; and he cannot escape this ob-

> ligation by a change in his business which will appreciably affect his needs; in other words, he impliedly contracts that he will conduct his business in the future, in a manner substantially similar to the way he is conducting it at the time of the contract," citing many cases.

And that such was the construction placed upon the parties upon their relative duties and obligations is clearly shown by the fact that in the contract in the instant case, Jenkins & Company protected itself by the insertion of a provision guaranteeing it as to price against a decline in the market.

Certainly no stronger term than "requirements" could be used. Weighty consideration should, we believe, be given to the fact that the language of the contract in the instant case is not merely that the defendant agrees to supply the sugar which the plaintiff might "require" during the period mentioned, but that plaintiff "buys" (present tense) its *"requirements"* of the defendant during said period.

Even had the word "require" been used, it is apparent that under the circumstances of the case, the Court following the established canons of construction, hereinbefore referred to, would construe the word "require" so as to cover what the plaintiff would ordinarily use, and if the plaintiff, under such circumstances, bought sugar elsewhere during the period covered by the contract, the defendant would have had a clear right to recover damages. In other words, as well pointed out by the writer in Cyc. (*supra*), the "freedom of action" of the plaintiff was limited and this furnished a consideration.

But the contract under examination obligates the

plaintiff to purchase from the defendant its *"requirements,"* and while the word "require" is sometimes used synonymously with merely "asking," the word "requirements" has a clear and definite significance in such a context and means "requisites." It is undoubtely a word of strong significance in such a context. If, as the Amended Complaint alleges, the plaintiff had an established business in sugar and the extent of its business was capable of reasonable estimation and was regular and not sporadic, then its *"requirements"* was a certain and definite thing within the law of contracts.

It was unquestionably this added significance which was had in mind by the Illinois Court in the case of **Russell v. Excelsior,** 120 Ill. App. 23-33:

> "The contract in question is for the appellee's *requirements* in stove bolts from December 14, 1898, to January 1, 1901, and this means such an amount of bolts as the appellee should need in the regular course of its business and not what appellee might choose to *require* from the appellant." (Italics ours.)

A study of Judge Bledsoe's opinion in the Court below, will disclose, that while he clearly comprehended the *rationale* of the distinctions rendering some contracts of the general nature discussed valid and others void, he failed utterly to apply the apt tests to the *facts* before him, but deemed the applicability of the opprobrious term "dealer" to Jenkins & Company, conclusive of its rights and remedies. He failed utterly to take into account the fact that Jenkins & Company had carefully safeguarded itself against

(a) The charge of "lack of mutuality

of obligation" by agreeing to confine its purchases to the Anaheim Co.;

(b) The charge of "uncertainty" by alleging its normal requirements and averring the Anaheim's knowledge of its past and prospective needs;

(c) The charge of inducement to eliminate any "requirements" if prices fell by stipulating for protection in the event of such a contingency.

That each and all of these elements of the contract under examination were overlooked, and that the "deep damnation" of the generic term "dealer" rendered him oblivious of the fact that the "dealer" in the particular instance had been shorn of his fatal attributes of uncertainty, of lack of mutuality, and of his ordinarily sordid proclivities, is evident from the following characteristic quotation:

T. W. Jenkins & Co. v. Anheim Sugar Co., 237 Fed. 278:

> "At the very threshold of the present case, however, we are met by the fact that the business of plaintiff is not that of manufacturing, or of similar import, in which its use of sugar would form but an incident of its general business, but it is that alone of selling sugar and other articles at wholesale. It buys such sugar, presumably, only as it can sell at a profit at current market prices, and it refrains from buying sugar which, because of a fall in price, it will be unable to sell, except at a loss to itself. Here the presumption which is indulged in and is referred to in

many of the cases cited has no application or play, because of the fact that the purchase and use of the commodity in question becomes, under such circumstances, not an incident to the main business of the purchaser, but the main business itself. Any fluctuation in the price of the commodity, especially if of generous proportions, as in the case at bar, inevitably affects the use of the commodity by the purchaser, and tends to negative the presumption that the business will continue substantially as intended by the parties. In this view of the case, the supposed 'requirements' of the plaintiff in its wholesale business are not the requirements of an established manufacturing or similar business, as the phrase is used in the reported cases. Presumably plaintiff, during a given period, will 'require' in its business just the amount of sugar it can sell. It will sell the amount of sugar it can dispose of at a profit; the greater the profit, the more it will dispose of; if it can dispose of none at a profit, it will require none.

"The situation can be stated concretely in a few words; plaintiff had contracted for all the sugar it would 'require,' meaning, of course, in its particular business, all it could sell, at the fixed price of $4.20 per bag. Before the contract became operative, the price of sugar in the market rose to $7.30 per bag. It needs no argument to show that, with an unlimited supply — its 'requirements' — at $4.20, there would be brought into play no particular effort or business sagacity on the part of plaintiff to effect sales at a handsome profit with the general market price firm at $7.30. To presume that it would not so conduct itself is to go counter to

> human experience. On the contrary, if the market price had fallen considerably, plaintiff would have refused to sell, save at a profit on its own purchase price, in which event none would have been so foolish as to buy, or it would have instructed its solicitors that it had no sugar at all to sell. In either event, its 'requirements' would have been the same, to-wit, practically nil. It would have bought no sugar from third persons, and would therefore have committed no breach of its engagement with defendant. To presume otherwise would be to disregard the most obvious motives of self-interest."

The reasons which led to Judge Bledsoe's conclusion are thus apparently:

> 1. Plaintiff's requirements are indefinite.
>
> 2. If the price rose plaintiff would sell an "unlimited supply"—its "requirements"—; if the price fell it would "instruct its solicitors that it had no sugar at all to sell."

"To presume otherwise," says Judge Bledsoe, "would be to disregard the most obvious motives of self-interest."

But "to indulge such a presumption" it may fairly be replied, "would be to disregard the admitted facts of the case," i. e.

> 1. Plaintiff's "requirements" were those of an established business with a

standing trade and were approximately known to defendant.

2. A fall in price would not constitute an inducement to discontinue selling because plaintiff was protected under the contract against a decline.

But, Judge Bledsoe argued, in the event of a sharp rise plaintiff could sell "an unlimited supply," which he treated as synonymous with "requirements."

We do not believe that if Judge Bledsoe were instructing a jury he would so advise them. He would, in construing the contract, tell the jury that the word "requirements" means the supply ordinarily utilized by Jenkins & Company under normal conditions with reasonable allowance for increase or decrease dependent upon the activity or sluggishness of market conditions, and that Jenkins & Company would have no right to mulct the Anaheim Company in damages by endeavoring to force delivery of enormous quantities in excess of its ordinary business in order to reap an exorbitant profit from adventitious circumstances. Judge Bledsoe's argument well illustrates the attitude we have referred to before as the theory of the "pusillanimity of courts." We submit that courts are not thus powerless to prevent the perpetration of fraud. The province of the court in thus instructing the jury as to limitation on orders arising from high prices is well illustrated in the case of **Dailey Co. v. Clark Can Co.**, 128 Mich. 591.

These are not matters to be passed on, on Demurrer. They are for submission to the jury under proper instructions. It did not occur to Jenkins & Company to attempt any such imposition, and we may add that it did not occur to counsel for Jenkins & Company that

any such imposition could be practiced on any American tribunal, Judge Bledsoe's fears notwithstanding.

As pointed out in the Whitebreast case, *supra,* the Court would so construe the word "requirements" as to carry out the intent of the parties, i. e., the normal business needs and not an "unlimited supply." If anything is to be read into a contract the Court will read into it a limitation of reasonableness, and not one of oppression, and Judge Bledsoe's opinion founded as it is upon the theory of oppression and the Court's powerlessness to prevent it, is evidently, we respectfully urge, based on fundamental error.

The Complaint alleges that the actual August requirements of Jenkins & Company for 1914 were 4800 bags, not a bag in excess of its normal requirements known to the Anaheim Company and this *notwithstanding the very condition of sharp advance conjured up by Judge Bledsoe.*

The proof will show the desire of the Anaheim Company to procure Jenkins & Company's exclusive business; the offer with knowledge of Jenkins & Company's approximate requirements; the acceptance; the omission of Jenkins & Company in reliance upon the contract, to procure its necessities elsewhere; the orders for the requirements; the rise in price and the squirming of the Anaheim Company when it developed that the bargain would be a bad one for it.

If we do not show these facts we will fail; if we do establish them, then we have complied with every condition imposed by the Cold Blast and the Crane cases, and the reasoning for the distinction between the dealer and manufacturer being thus obviated, the dis-

tinction ceases to exist in conformity with the ancient maxim

Cessante ratione, cessat lex ipsa.

We have referred to the fact that the references to "dealers" in the decided cases occur in illustrative *dicta* involving hypothetical facts differing radically from those in the case at bar. In truth, perhaps the only case to be found in the Federal Reports in which a dealer was clearly a party is that of **Crane v. Crane** (7th Circuit), 105 Fed. 869. The Crane case is the other one of the two cases on which Judge Bledsoe relied and in so doing, he overlooked the very obvious distinction between that case and the instant one which is pointed out in the particularly full discussion of the subject found in the case of

Grand Prairie Gravel Co. v. Wills Co., (Tex.) 188 S. W. 680.

in which the Court said:

> "A careful perusal of the facts in this case (referring to Crane v. Crane) discloses that the contract, which was verbal, lacks one vital feature, the effect of which is to destroy its mutuality and deprive it of the elements of consideration. By its terms it attempts to bind the defendant to furnish to plaintiffs all the dock oak required by them for their use in the Chicago market during the year 1897, but it does not bind the plaintiffs to purchase oak from the defendant alone. *The plaintiff was at liberty, under the contract, to buy elsewhere,* if the prices of such lumber were more favorable to him, and the defendant would be without remedy." (Italics ours.)

There was indeed no averment in the Crane case of the vendor's *knowledge* of the purchaser's requirements, and no averment that the purchaser had an *established* business. **Had the purchaser been a manufacturer, in the Crane case, the conclusion would have been in no wise different, under such circumstances.** This fact is strikingly illustrated in the Cold Blast case (*supra*) in which the purchaser was a manufacturer, but the contract was held to be without validity because he had *not* bound himself to purchase his "requirements." The analogy is so attentuated that it is not surprising in view of his use of the Cold Blast and Crane cases as binding precedents, that Judge Bledsoe reached an erroneous conclusion.

Judge Bledsoe was apparently deterred by the fact that so far as he could find, the well reasoned case of Minnesota Lumber Co. v. Whitebreast Coal Company, *supra,* was the only one in which a "requirement" contract had been upheld as to dealers, while the validity of such contracts had been denied as to dealers by the Cold Blast and Crane cases. We believe we have demonstrated indisputably that the Cold Blast and Crane cases properly studied justify no such conclusion. No case has, so far as we can discover, been decided in the Federal or State Courts, since the advent of modern business conditions, in which the validity of such an agreement with a dealer has been denied, where the requirements, as here, were *measurably ascertainable* and the dealer agreed to *limit his purchases* to the contracting vendor. Nor in reality is the Whitebreast case the only one affirmatively upholding the validity of these dealers' contracts. See *inter alia*:

> **Grand Prairie Gravel Co. v. Wills Co.,** (Tex.) 188 S. W. 680. (Decided with full appreciation of the Whitebreast and Crane cases.)

Western Macaroni Co. v. Fiore, (Utah) 151 Pac. 984. (Decided on the authority of the Cold Blast case.)

Ramey Lumber Co. v. Schroeder Lumber Co., 237 Fed. 39.

* * * * * *

In conclusion we submit that the decision of the Circuit Court of Appeals for the Ninth Circuit, in this case, will be of vast importance to the commercial interests of the United States for the reason that contracts of the character before the Court are so eminently appropriate and useful as to be now almost universal, and as the decision of an authoritative tribunal in a case of novel impression, it will largely determine whether or not wholesale dealers, under proper circumstances, may transact their business with real protection as to reasonably prospective requirements, without fear that the performance of the agreement will be left to the cupidity or even the tender mercy of the vendor.

Respectfully submitted,

BEACH, SIMON & NELSON,

ALLEN & WEYL,

Attorneys for Appellant.